

NO. 08-16075

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA *ex. rel.* TERRY GODDARD,
the Attorney General; THE CIVIL RIGHTS DIVISION
OF THE ARIZONA DEPARTMENT OF LAW,
Plaintiffs-Appellants,

&

FREDERICK LINDSTROM, by and through his parent and
legal guardian RACHEL LINDSTROM; LARRY WANGER,
Plaintiffs-Intervenors-Appellants,

VS.

HARKINS AMUSEMENT ENTERPRISES, INC., ET AL.,
Defendants-Appellees.

On Appeal from the United States
District Court for the District of Arizona

BRIEF OF *AMICUS CURIAE* THE WASHINGTON STATE
COMMUNICATION ACCESS PROJECT, JOINED BY THE
HEARING LOSS ASSOCIATION OF AMERICA and others,
SUPPORTING PLAINTIFF-APPELLANTS AND SEEKING
REVERSAL OF THE DISTRICT COURT DECISION

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CORPORATE DISCLOSURE

Pursuant to Rule 26.1, Fed. R. App. P., the Washington State Communication Access Project, the Hearing Loss Association of America and the Hearing Loss Association of Washington state that they are all non-profit corporations that do not issue shares. None of them have a parent corporation.

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I.

STATEMENT OF IDENTITY AND INTEREST

Pursuant to Fed. R. App. P. 29, the Washington State Communication Access Project (Wash-CAP), the Hearing Loss Association of America (HLAA), the Hearing Loss Association of Washington (HLA-WA), the Arizona Commission for the Deaf and Hard of Hearing, HLA chapters in Phoenix, West Valley, Fountain Hills, Prescott and Yuma, Arizona, the Adult Loss of Hearing Association in Tucson, Arizona, and the Association of Late-Deafened Adults (ALDA) Puget Sound chapter respectfully submit this brief in support of Appellants State of Arizona, Frederick Lindstrom and Larry Wanger.

Wash-CAP is a non-profit Washington corporation that aims to enrich the lives of its members and similarly situated persons by ensuring the availability of auxiliary aids and services, such as captioning, that make aurally delivered communication in public places understandable to persons with hearing loss. Wash-CAP acts through communication, education, cooperation and, if necessary, litigation.

The **Hearing Loss Association of America** (HLAA), a non-profit 501(c)(3) membership organization, is the nation's leading consumer organization representing people with hearing loss on a national and global

level. There are at least 31 million Americans with hearing loss, and 93 percent of the members of HLAA are so affected. HLAA's national support network includes an office in the Washington D.C. area, 14 state organizations, and 200 local chapters.

The HLAA mission is to open the world of communication to people with hearing loss through information, education, advocacy, and support. HLAA actively advocates public policies to protect the rights of people with hearing loss and to provide access to affordable technology that enables persons with hearing loss to function in their daily lives, including having full access to places of public accommodation.

Because of the general failure to provide captioning, movie theaters remain inaccessible for many individuals with hearing loss. HLAA has a strong interest in seeing that such people are not subject to discrimination that causes them to be improperly excluded from movie theaters and other places of public accommodation displaying films and other multimedia. These millions of individuals are entitled to full and equal enjoyment of the experience of going to the movies. In furtherance of these interests, the HLAA joins this brief.

The **Hearing Loss Association of Washington** (HLA-WA) is a state affiliate of HLAA. It is an active organization with 10 local chapters. Its

interests parallel those of the national organization, with a particular emphasis on the needs and interests of individuals with hearing loss in Washington State.

The **Arizona Commission for the Deaf and Hard of Hearing** is a State of Arizona agency established in 1977 as a statewide referral agency that works to improve the quality of life for Arizonans with hearing loss. It supports efforts by citizens to gain full access to entertainment venues, particularly movies, through the provision of open and closed captioning.

The **Hearing Loss Association of America** chapters in **Phoenix, West Valley, Fountain Hills, Prescott and Yuma, Arizona**, and the **Adult Loss of Hearing Association** in **Tucson, Arizona**, also join this brief. All are organizations that work to better the lives of their members and the 500,000-plus people in Arizona with hearing losses.

The Association of Late-Deafened Adults (ALDA) is a non-profit organization whose mission is to support and empower adults who have lost their hearing after having acquired speech. Its Washington State chapter – **ALDA-Puget Sound** – joins this brief in furtherance of ALDA's objective of providing practical solutions to the problem of hearing loss.

This brief addresses the question of movie captioning from two perspectives that may not be covered completely in other briefs. First, our

perspective is that of hard-of-hearing or deaf individuals who communicate in whole or in part through speech rather than through sign language.

Second, our perspective is that of individuals living in Washington and other Ninth Circuit states whose interests will be directly affected by the rule of law declared in this case.

We submit that a discussion of the need for movie captioning in Washington and other Ninth Circuit states, together with a focused discussion on the text of the Americans with Disabilities Act, will assist this court in reaching the decision that we believe the law mandates – a reversal of the District Court opinion and a remand for further proceedings. Moreover, because of the vital importance of this case, we submit that hard-of-hearing individuals should know that their perspective has been represented to and considered by this Court.

The *amici* submitting this brief also endorse and support the arguments being made by appellants for reversal of the trial-court decision, as well as the arguments raised by other supporting *amici*, including the Alexander Graham Bell Association for the Deaf and Hard of Hearing, and the National Association of the Deaf.

All parties have consented to the filing of this brief.

II.

THE TRIAL-COURT DECISION

The opinion below is *Arizona ex. rel. Goddard v. Harkins Amusement Enterprises, Inc.*, 548 F.Supp. 723 (D. Ariz. 2008).

The operative facts are simple. The Arizona Attorney General's office filed a class-action suit against defendant theater owners on behalf of movie patrons with hearing and visual impairments. The complaint said that the theaters violated the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12100 *et seq.*, and the companion Arizona state law by failing to show movies with captions to make the movies accessible to persons with hearing loss, or with narrative descriptions to make the movies accessible to visually impaired persons.

Defendants moved to dismiss for failure to state a claim. For purposes of the Rule 12(b)(6) motion, they conceded that captions and descriptions are readily available. 548 F.Supp.2d at 726. They did not assert that providing captions or descriptions would constitute an undue burden. *Id.* at 727. Their sole argument was that providing captions or descriptions would alter the content of their services. *Id.*

The court granted the motion. It reviewed several cases which declared that ADA does not regulate the content of goods and services, or

require that the content be changed to fit the needs of the disabled. 548

F.Supp.2d at 727-28. The court declared that captions or descriptions would constitute such alterations, saying:

Movie theaters offer motion pictures to the public in a specific format which combines audio and visual elements. However, Plaintiffs' request would require Harkins to alter the form in which it normally provides its services. ... Captioning changes audio elements into a visual format. ... Descriptions change visual elements into an audio format. Persons with sensory disabilities are not 'excluded, denied services, segregated or otherwise treated differently than other individuals' because they are offered the same form of service as other members of the public.

548 F.Supp.2d at 729.

The court bolstered its conclusion in two other ways. First, it referred to the ADA legislative history, which includes a passage stating that "open-captioning, for example, of feature films playing in movie theaters is not required by this legislation," *Harkins, supra*, 548 F.Supp.2d at 730, quoting H.R. Rep. No. 101-485(II) at 108 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 391). Second, the court looked to the Department of Justice interpretation to the effect that "Movie theaters are not required by [implementing regulations] to present open-captioned films." 28 C.F.R. Pt. 36, App. B(C). 548 F.Supp.2d. at 731.

III.

RELIEF REQUESTED ON APPEAL

As the parties and other *amici* will discuss in their briefs, movies can be captioned in two ways – closed captions, which are visible to only those patrons who request the necessary viewing equipment, and open captions, which are visible to all patrons.

The *amici* submitting this brief take no position on which of those methods of captioning ought to be employed. Our objective is simple – we want the members of our organizations and the millions of other Americans with hearing loss to be able to fully enjoy the movies by being able to understand the audio aspects of the film.

We therefore ask this Court to reverse the trial-court decision and to remand the case for trial.

IV.

AN OVERVIEW OF HEARING LOSS AS WE LIVE IT.

Of all the physical limitations that might be termed “disabling,” hearing loss may be both the most prevalent and the least acknowledged, even by those who are personally affected. To understand how both those conditions can exist, and why movie captioning is so essential to this population, it is necessary to understand the nature of hearing loss as we live it.

A. Most Losses Are Not Primarily Losses of the Ability to Hear Speech, but of the Ability to Understand Speech.

Sound waves enter the ear and move the eardrum. That motion is transmitted by tiny bones and membranes to the fluid in the inner ear, where the vibrations excite nerve cells that signal the brain, creating the sensation of hearing.¹ There are thousands of hair-like nerve cells, each of which responds to a different frequency, or pitch.

The most common form of hearing loss is what is referred to as “sensorineural” loss, in which some of the sound-transmitting nerve cells are

¹ This explanation comes from Sataloff, Robert T. and Sataloff, J., *Hearing Loss*, 1993 (3d ed.), and has been reviewed for technical accuracy by Lisa Illich, professional audiologist and lecturer in the University of Washington’s Department of Speech and Hearing Sciences. While the author of this brief has attempted to adhere to the Sataloff text, some of the statements also reflect the author’s own life experience as a person with a significant high-frequency hearing loss.

damaged and become less responsive. A louder sound is needed to prompt damaged nerves to signal the brain than is needed to trigger undamaged nerves. Nerve damage has a multitude of causes, including age, head trauma, tumors, noise exposure, certain illnesses, chemotherapy, hearing-destroying (ototoxic) medicines, congenital causes and autoimmune reactions. There is not, at present, any way to reverse or repair nerve-cell damage.

Nerve damage is seldom uniform – the nerve cells that respond to some frequencies are usually damaged more than nerve cells that respond to other frequencies, meaning that greater sound volume is required to hear sounds at some frequencies than at others.

Because the cells that respond to high frequencies are located closer to the eardrum and the outer ear than cells that respond to low frequencies, the most common pattern of sensorineural loss is high-frequency loss, in which the nerve cells that register high-frequency tones are damaged considerably more than the nerves that register low-frequency tones.

High-frequency hearing loss interfaces with speech in an unfortunate way. Human speech generally uses frequencies between about 250 cycles per second (designated as Hertz, or Hz) and 3,000 Hz.² Vowel sounds,

² As a frame of reference, the musical note A above middle C that orchestra concertmasters use for tuning has a frequency of 440 Hz.

which are vocalized, are relatively low frequency – below 1,500 Hz. Consonants, on the other hand, are not so much vocalized as clicked, whistled or popped, and those sounds have much higher frequencies – especially consonants like s, f, k, p, t and z. Consonants also tend to be spoken less forcefully. As Sataloff explains:

[T]he vowels are relatively powerful sounds, whereas consonants are weak and quite often are not pronounced clearly or even are dropped completely in everyday speech. Vowels give power to speech; that is, they signify that someone is speaking, but by themselves they give very little information about what the speaker is saying.³

The result of a high-frequency hearing loss is that the listener will hear the vowel sounds – frequently at a relatively normal volume – but will not hear the consonants and thus will not understand what is being said.

Because the listener continues to hear the vowels at close to normal volume, persons with high-frequency loss may be completely unaware that they have a hearing deficit. Their subjective experience is that their hearing is perfectly normal, but that the speaker is failing to enunciate.⁴

For people with high-frequency losses, simply increasing the volume uniformly at all frequencies is almost never a helpful solution. If the volume

³ Sataloff, *supra*, at 418.

⁴ Sataloff, *supra*, at 419.

were made loud enough to make the consonants understandable, the vowel sounds would be unbearably loud.⁵ So the reality for individuals with significant high-frequency hearing loss is that speech is heard but is unintelligible *irrespective of the volume*.⁶

B. Hearing Loss Is Far More Prevalent Than Is Generally Acknowledged, Especially by Those Who Experience It.

There is no single, definitive source of data on the prevalence of hearing loss in the United States. One commonly cited number is 31 million – roughly ten percent of the population. Other published estimates place the prevalence at over 15 percent. We think the most critical question is not how many people have a clinically detectable loss, but rather, how many people have a loss severe enough to compromise their ability to communicate.

⁵ Good hearing aids boost the volume of certain frequencies more than others. By “mirroring” the individual’s hearing loss, aids can be extremely useful. But because of the enormous number of nerve cells that the limits of modern technology, not even the best aids can restore normal hearing, and there will be users of state-of-the-art hearing aids who are still unable to understand speech without visual cues.

⁶ Sataloff, *supra*, at 419. Knowing what is being said can trigger a response in the brain similar to the response triggered by the inner-ear nerve cells themselves. When people with a hearing loss can anticipate what is being said, they have the sensation of “hearing” consonants pronounced clearly and distinctly. This phenomenon accounts for the frequent assertion that some people with hearing losses “hear what they want to hear.” It isn’t a question of wanting. But people with hearing losses do “hear” what they *expect* to hear, which often can make their comprehension appear to be something that can be turned on or off at will.

The best answer to that critical question comes from a recent study undertaken by physicians at Johns Hopkins University. That study, published in July of 2008, examined the actual audiograms of almost 6,000 randomly selected adults who participated in the National Health and Nutritional Examination Surveys between 1999 and 2004.⁷ Audiograms indicate the threshold volume, measured in decibels (dBs), at which the listener first hears pure tones of different frequencies. Based on that large sample, the Hopkins study reports that 7.8 percent of the adult population aged 20-69 have what the study's authors defined as a "speech-frequency hearing loss" in both ears, and an equal number have a loss in one ear.⁸

The Hopkins study is especially valuable because the authors define what they mean by hearing loss. Their definition of loss is an average decibel threshold in the four speech frequencies – 500Hz, 1,000 Hz, 2,000 Hz and 4,000 Hz – of 25dB or greater. The 25dB threshold number is highly significant, because that is the level at which speech begins to be unintelligible. In fact, a bilateral hearing loss that averages 25 dB or greater

⁷ Agrawal, Yuri et al., *Prevalence of Hearing Loss and Differences by Demographic Characteristics Among U.S. Adults*, 168 Arch. of Intern. Med. (14) 1522, 1524 (July 28, 2008).

⁸ A loss in one ear only, though inconvenient, is not considered disabling. Such a loss limits the ability to locate the source of sound, but does not materially interfere with one's ability to understand speech.

in four speech frequencies is a compensable occupational disability in Washington and in a number of other states. So what the Hopkins study tells us is that 7.8 percent of adults between the ages of 20 and 69 have hearing losses of a severity that would entitle them to some compensation if the losses occurred on the job.⁹

Assuming that the prevalence of hearing loss in the Ninth Circuit states does not differ dramatically from the prevalence nationwide, we can use the 2006 Census Bureau population estimates for people over 20 in each Ninth Circuit state to produce the following estimates of the number of people with an impairing hearing loss:

Alaska – 36,400

Arizona – 341,000

California – 2,019,000

Hawaii – 71,700

Idaho – 80,000

Montana – 54,000

Nevada – 140,000

⁹ Washington Department of Labor & Industries, *Hearing Impairment Calculation Worksheet*, <http://www.lni.wa.gov/Forms/pdf/252007a0.pdf>. Washington uses the American Medical Association hearing-impairment guidelines, which measure the average decibel thresholds at 500 Hz, 1kHz, 2kHz and 3kHz.

Oregon – 213,000

Washington – 364,000

These estimates, based on best available data, indicate that more than 4.3 million people in Ninth Circuit states – and more than 16 million people nationwide between the ages of 20 and 69 – have a hearing loss that interferes significantly with their ability to understand speech

C. People Who Cannot Understand Speech Can Still Communicate Verbally by Using Visual Information.

Fortunately, people who are unable to understand speech are still able to communicate verbally. They do this by supplementing their hearing with visual information such as speech-reading (sometimes called lip-reading), by being attuned to the speakers' facial expressions, and by being aware of the context of the speech.

But the coping strategies that suffice in a one-on-one conversational situation are frequently inadequate for situations in which there are no visual cues, such as a telephone conversation, or where the listener is not part of the conversation and thereby can't help shape the context, or where background noise further masks the consonants. Movies are a classic example of a situation in which the coping strategies are insufficient.

There is one very simple way to make speech understandable to people with hearing loss. That is to provide the audio elements in a visual

format, so that the hearing-impaired person can read along. Where audio elements are provided in a visual format, access to that material for the hearing-impaired goes from essentially non-existent to virtually complete. The most obvious proof of the efficacy of captioning is closed-captioning on television, which makes that medium almost completely accessible to the hard of hearing.

Captioning works in other contexts as well. Some live theaters are now offering captioned performances – at Wash-CAP’s urging, several Seattle theaters are now offering or planning to offer captioned performances. Meetings are frequently captioned, and captioning is frequently offered in classrooms for hearing-impaired students.

D. The Movie Industry’s Efforts to Accommodate the Hearing-Loss Population Have Largely Been Ineffective.

Movies are also captioned, albeit infrequently. The infrequency of captioning is a conscious choice of theater operators – as the defendants below conceded for purposes of their Motion to Dismiss, captions and descriptions are readily available. Theaters that wanted to display captions or descriptions could easily do so.

The movie industry’s response to hearing loss has had only limited benefits. Virtually all theaters offer Assistive Listening Devices. But those devices do little more than uniformly increase the volume, and as explained

previously, uniformly increasing the volume does not help people with speech-frequency hearing loss. Because those devices are of little use, they are little used.¹⁰

The fact remains that in the absence of captioning, a significant portion of the population finds movies partially or wholly inaccessible. The estimates derived from the Hopkins study of hearing-loss prevalence – large as they are – dramatically *understate* the problem for two reasons. First, the Hopkins study did not assess the prevalence of hearing loss for people over 69, and both the prevalence and severity of hearing loss increase sharply as people age. Second, the inability of a person with a hearing loss to enjoy movies has a ripple effect. If a person stops going to movies because he or she can't understand the dialogue, that person's spouse or partner also may not attend.

Many households respond to hearing loss by avoiding the theater experience, and waiting until the movie is available on captioned DVD so that the couple or family can enjoy the movie together. They see the movie – albeit well after the theatrical release – but they are improperly excluded

¹⁰ Hearing-aid compatible systems that feed into hearing aids rather than substituting for them are an improvement over incompatible ALDs, but because even the best aids cannot restore full hearing, hearing-aid compatible ALDs won't be sufficient for everyone. Moreover, only a small fraction of people who could benefit from hearing aids use them.

from the full and equal enjoyment of the theater experience – perhaps the most affordable form of entertainment – and are excluded from the daily conversations about popular movies. Such illegal exclusions frustrate one of the principal objectives of the ADA, which is to reduce the social isolation of people with disabilities.

V.

SUMMARY OF LEGAL ARGUMENT

The trial-court decision disregarded the most fundamental rule of statutory interpretation, namely, that a court must first examine the text of the statute itself. Rather than beginning with the language of the ADA, the court began its analysis by examining *dicta* from cases with wholly inapplicable facts to deduce what it thought were general rules. Applying those general rules, the court concluded that movie captioning is not required. The trial court bolstered that conclusion by examining both suspect legislative history and an overly rigid reading of regulations.

We submit that if this Court begins, as it must, by examining the text of the statute, it will see that movie captions and descriptions are explicitly addressed, and that both are required *unless* doing so would constitute a “fundamental alteration” or an “undue burden.” We therefore ask this Court to reverse the trial court opinion, to declare as a matter of law that captions and descriptions do not constitute a fundamental alteration, and to remand the matter for a determination of whether as a matter of fact installation of equipment to furnish open or closed captions or narrative descriptions would constitute an undue burden.

VI.

LEGAL ARGUMENT

A. **Contrary to the Trial's Court's Holding, the ADA Explicitly Requires Changing Audio Elements into a Visual Format and Visual Elements into an Audio Format.**

After stating that “a ‘simple reading’ of the ADA does not compel the answer to the issue raised in this case,” 548 F.Supp.2d at 727, the District Court then analyzed *dicta* from a series of cases having nothing to do with movie captioning to ultimately conclude that ADA does not require movie theaters to “change audio elements into a visual format” or “visual elements into an audio format.” But as we will show, the text of the ADA requires precisely that.

1. **Public Accommodations Such As Movie Theaters Must Furnish Auxiliary Aids and Services to Patrons with Hearing or Vision Impairments.**

The basic structure of ADA proceeds from the general to the specific. The provisions of ADA dealing with public accommodations such as movie theaters are found at 42 U.S.C. § 12182. Section 12182(a), titled “general rule,” states:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.

The ADA defines “disability” as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(2). Defendants stipulated that both hearing impaired and visually impaired individuals have a “disability” within the meaning of ADA. 548 F.Supp.2d at 727. “Motion picture houses” are specifically enumerated in the ADA as being “public accommodations.” 42 U.S.C. § 12181(7)(C), and Harkins conceded that point as well. 548 F.Supp.2d at 727.

There is no question about whether motion picture houses may discriminate against patrons with hearing or visual impairments – they plainly may not. The only question is, what must a motion picture house do, or refrain from doing, in order not to discriminate?

That question is answered by the “specific prohibitions” enumerated in 42 U.S.C. § b(2)(A)(iii), as follows:

For purposes of subsection (a) of this section, discrimination includes –

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals *because of the absence of auxiliary aids and services*, unless such entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service,

facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

(emphasis added). So as that provision states, a motion picture house must not only permit a disabled individual to enter the premises and “enjoy” the offered goods and services on an equal basis with others. The facility must further assist those individuals by providing “auxiliary aids and services.”

2. Auxiliary Aids and Services Are Defined as Methods or Devices to Change Audio Elements into a Visual Format and Visual Elements into an Audio Format.

Having established that ADA requires public accommodations such as motion picture houses to offer “auxiliary aids and services,” the next question is, what are those “auxiliary aids and services” that a public accommodation such as a movie theater must provide? Again, ADA specifically tells us that, as follows:

The term “auxiliary aids and services” includes –

- (A) qualified interpreters or other *effective methods of making aurally delivered materials available to individuals with hearing impairments*;
- (B) qualified readers, taped texts, or other *effective methods of making visually delivered materials available to individuals with visual impairments*;
- (C) acquisition or modification of equipment or devices; and
- (D) other similar services and actions.

42 U.S.C. § 12102(1)(emphasis added).

The import of that definition is unmistakable. “Auxiliary aids and services” are people, devices, services or actions that provide help to people with hearing or vision impairments *by changing audio elements into visual format and visual elements into an audio format, thereby making those materials available to persons with hearing or vision impairments.*

The implementing regulations at 36 CFR § 36.303(b)(1) bolster that characterization by adding the following to the list of “auxiliary aids and services”: “notetakers, computer-aided transcription services, written materials ... closed caption decoders, open and closed captioning” and “videotext displays.” Each of those enumerated aids and services convert audio elements into a visual format. Similarly, 36 CFR § 36.303(b)(2) adds “audio recordings” to the statutory list of “auxiliary aids and services” – specifying another means by which visual elements may be converted to audio.

B. Substituting Specific Terms for General Terms Reveals the Explicit Statutory Requirement of Captions and Descriptions.

It is illuminating here to re-read the statute, employing the high-school algebra technique of substituting one term for another term defined as being equal. If we insert the specific definitions, which we underline, in

place of the general terms, which we put in parenthesis for reference, then

Section 12182(b)(2)(A)(iii) of the ADA reads as follows:

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes –

(iii) a failure to take such steps as may be necessary to ensure that no individual with a hearing impairment or visual impairment (disability) is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of qualified interpreters, notetakers, computer-aided transcription services, written materials ... closed caption decoders, open and closed captioning, videotext displays or other effective methods of making aurally delivered materials available to individuals with hearing impairments, or qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments, (auxiliary aids and services) unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage or accommodation being offered or would result in an undue burden.

This reading of the statute – substituting specific terms for general terms – reveals the lower court’s error in stark relief. The opinion states that changing audio elements into a visual format for the benefit of the hearing impaired, or changing visual elements into an audio format for the benefit of the visually impaired, is contrary to the intent and purpose of ADA. That

conclusion is totally erroneous. Rather, changing the form of audio and visual elements is an *explicit requirements of ADA*. Unless doing so would constitute a fundamental alteration or an undue burden, *the failure to change visual elements to an audio format or vice versa constitutes impermissible discrimination under ADA*.

C. The ‘Fundamental Alteration’ Defense Cannot Apply, and the ‘Undue Burden’ Defense Is a Fact Issue that Was Not and Cannot Be Decided in a Motion to Dismiss.

The only instances in which audio elements need not be converted to visual format or vice versa is when doing so would constitute a “fundamental alteration” or an “undue burden.”

Although not specifically citing to the “fundamental alteration” language of Section 12182(b)(2)(A)(iii), the trial court arguably believed that defense applied to captions or descriptions. But such a conclusion – one not reached by any other court that has considered the question of movie captioning – cannot be correct.

By statutory definition, “auxiliary aids and services” are devices that change audio elements into visual form and visual elements into audio form. If the mere act of converting audio elements into visual form and vice versa constituted a “fundamental alteration,” then there would be no circumstances in which “auxiliary aids and services” could ever be required – the defense

of “fundamental alteration” would completely swallow the requirement of furnishing “auxiliary aids and services.”¹¹ This Court cannot endorse an interpretation that would render Section 12182(b)(2)(A)(iii) completely meaningless.

The remaining defense is that such a conversion would constitute an “undue burden.” The ADA lacks a bright-line test or even a clear definition of what constitutes an “undue burden.” The Department of Justice takes the position that the lack of definition was intentional, stating:

Congress intended that ‘undue burden’ under § 36.303 and ‘undue hardship,’ which is used in the employment provisions of Title I of the ADA, should be determined on a case-by-case basis.

28 CFR Pt. 36, App. B at 716 (2007 ed.). That fact-specific inquiry basically involves comparing the cost of the action against the resources of the facility. 28 CFR § 36.104.

Because of that need for a fact-specific, case-by-case determination of whether providing captions or descriptions constitutes an “undue burden,”

¹¹ We believe that a “fundamental alteration” of a movie would be changing the aural or visual content of the movie itself to lend that content more readily to captions or descriptions. That, we concede, is not required. Thus, for example, the grand battle scenes in *Lord of the Rings* would not need to be simplified to the point that they could be fully described in the time allotted to them on screen, nor would a movie remake of *Hamlet* have to condense the “to be or not to be” soliloquy to something like, “I’m truly conflicted,” in order that the captions could more easily be read.

defendants did not advance that defense in connection with their motion to dismiss,¹² and the trial court obviously could not and did not consider it. Whether providing captioning and/or descriptions is an undue burden for some, all or none of the Harkins theaters in Arizona is a question that can only be determined upon reversal and remand to the trial court.

D. Neither General Principles Derived from Factually Unrelated Cases, Legislative History, Nor Agency Interpretation Can Overcome an Explicit Statutory Mandate.

As previously stated, the trial court's fundamental and fatal error was beginning its inquiry not by examining the statute, but by looking at language from factually unrelated cases – *dicta* at that – and giving dispositive effect to that language. The court bolstered its erroneous holding with legislative history and with agency interpretations.

We believe the court misconstrued the cases, the legislative history and the agency interpretations and regulations. Those arguments are going to be set forth in detail in briefs of the appellants and other *amici*. We support those arguments, and will not repeat them here at any length. We do wish to point out, though, that under well-established principles of statutory

¹² It is even possible that Harkins waived the undue burden defense if it failed to plead it in timely fashion, but that is not an argument for *amici*.

construction, those sources of authority must be subordinate to rather than controlling over the plain language of the statute itself.

1. General Principles Derived from Other Cases Cannot Control over Specific Statutory Provisions that Squarely Address the Issues Raised in this Case.

Looking at a number of cases that dealt with the question of whether ADA regulates the content of insurance policies, the trial court derived what it believed to be two general principles. First, it declared that ADA does not regulate the content of goods or services offered by public facilities. Second, the court stated that ADA requires access only, and does not impose affirmative obligations on a facility to enhance the experience of disabled patrons.

There may be contexts in which such principles would apply, but this case is clearly not one of them. As this Court has stated, “general and specific provisions, in apparent contradiction ... may subsist together, *the specific qualifying and supplying exceptions to the general.*” *Santiago Salgada v. Garcia*, 384 F.3d 769, 774 (9th Cir. 2004)(citations omitted)(emphasis added).

Thus, even if there is a general rule that ADA does not require affirmative action on the part of the facility, the explicit requirement to provide “auxiliary aids and services” is a specific and controlling exception.

Similarly, if there is a general rule that a facility need not alter the content of its goods or services to make them more usable by a person with a disability, the definition of “auxiliary aids and services” as methods of converting audio elements into video format for the hearing impaired and converting video elements into audio format for the visually impaired is a specific and controlling exceptions.

2. Legislative History, Standing Alone, Cannot Alter the Plain Meaning of a Statute.

In its discussion of legislative history, the lower court cited a snippet from the House Committee Report to the effect that “open-captioning of feature films is not required by this legislation.” *Harkins, supra*, 548 F.Supp.2d at 730, citations omitted. But that statement in the House Committee Report is completely free standing – there is absolutely nothing that explains *why* the House committee believed that open-captioning of feature films is not required,¹³ *how* that conclusion can be reconciled with the statutory language, nor *why* such an exemption – if indeed intended –

¹³ An exemption for movie theaters could have easily been provided had the enumeration of “public accommodation” either specifically excluded or simply omitted any reference to “motion picture houses.” Instead, as noted, they are specifically included within the coverage of ADA. Moreover, as other briefs will point out, there is a vast difference between “open-captioned” films as they existed at the time of ADA’s passage and closed-captioned films or open-captioned films under today’s technology.

was not made a part of the statute itself. H.R. Rep. No. 101-485(II), at 108, *as reprinted in* 1990 U.S.C.C.A.N. 303, 391.

As this Court has often noted in the past, legislative history may provide guidance to interpret an *ambiguous* statute. But such history cannot control – indeed, should not even be considered – where, as here, the statutory language itself is clear.

Hearn v. Western Conference of Teamsters Pension Fund, 68 F.3d 301 (9th Cir. 1995) is particularly instructive. There, the text of the statute said one thing, the legislative history another. This Court agreed that a square conflict existed between what the statute actually said and what the legislative history indicated the statute meant. But the Court had no doubt about the outcome, saying:

[L]egislative history – no matter how clear – can’t override statutory text. Where a statute’s language ‘can be construed in a consistent and workable fashion,’ we must put aside contrary legislative history.

Id. at 304, citations omitted.

The same rule applies here. The language of ADA requires public accommodations, which are specifically defined as including movie theaters, to offer auxiliary aids and services to patrons unless doing so would impose an undue burden. The statutory definition of auxiliary aids and services

specifically states that their purpose is to convert audible material into visual form and vice versa. That statutory language can be construed in a consistent and workable fashion. Arguably contrary legislative history has no effect.

3. Administrative Interpretations Cannot Override Explicit Statutory Language.

The district court turned finally to the Department of Justice's interpretations of ADA and the implementing regulations. 548 F.Supp.2d at 730-731. The pertinent regulation, found at 28 C.F.R. § 36.303, tracks the statutory language requiring the provision of auxiliary aids and services. In an explanatory appendix, DOJ states that "movie theaters are not required by § 36.303 to present open-captioned films." 28 C.F.R. Pt. 36, App. B(C).

Like the legislative history, DOJ's statement in the appendix is free standing and unsupported – DOJ provides no explanation whatsoever that would reconcile the unambiguous statutory requirement for auxiliary aids and services with an agency interpretation arguably exempting movies.

DOJ acknowledges, at least implicitly, that there is no rational explanation for its statement regarding movies. Immediately after asserting that movie *theaters* are not required to present open-captioned films, the appendix goes on to state:

However, other public accommodations that impart verbal information through soundtracks on films, video tapes, or slide shows are required

to make such information accessible to persons with hearing impairments. Captioning is one means to make the information accessible to individuals with disabilities.

28 CFR Pt. 36, App. B at 715 (2007 ed.)(emphasis added).

DOJ, then, agrees that the affirmative statutory and regulatory mandate to furnish auxiliary aids and services does in fact require “public accommodations” that show movies to render “soundtracks on films, video tapes or slide shows” understandable to persons with hearing impairments. Yet without a shred of textual support or an iota of rationale, DOJ nonetheless suggests that the statutory requirements applicable to public purveyors of “films, video tapes or slide shows” somehow do not apply in quite the same way to movies shown in movie *theaters*.

While agency interpretations are often entitled to considerable deference, those interpretations must still conform to the express language of the statute, “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-3, 104 S.Ct. 2778, 2781 (1984).

Moreover, those interpretations must be “reasonable, that is, [must] sensibly conform to the purpose and wording of the regulations.” *Oregon Paralyzed Veterans v. Regal Cinema*, 339 F.3d 1126, 1131 (9th Cir. 2003), quoting

Martin v. Occupational Safety & Health Review Comm'n, 449 U.S. 144, 150-51, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991).

All the deference in the world could not rationalize a construction that would provide a blanket exemption for movie *theaters* from statutory and regulatory mandates requiring “verbal information [imparted] through soundtracks on films” to be made accessible to the hearing-impaired through means like captioning. If that is indeed DOJ’s position, it is manifestly unreasonable, and must give way to the express mandates of ADA requiring the provision of auxiliary aids and services.

VII.

SUMMARY AND CONCLUSION

In order to affirm the decision below, this Court must conclude, as did the trial court, that the Americans with Disabilities Act does not require movies to be captioned for the hearing impaired or aurally described for the visually impaired even if doing so would not constitute an “undue burden.” As the text of the statute shows, the trial court’s decision was erroneous.

As a “public accommodation” within the meaning of ADA, defendant theaters are required to furnish “auxiliary aids and services” except where doing so would require a fundamental alteration of the goods or services provided, or constitute an “undue burden.” 42 U.S.C. § 12182(b)(2)(A)(iii).

“Auxiliary aids and services” are specifically defined by ADA as encompassing various means of converting aurally delivered material into visual form for the hearing impaired, and visually delivered material into aural form for the visually impaired. 42 U.S.C. § 12102(1). Substituting the definition for a defined term, ADA requires movie theaters (as public accommodations) to furnish effective means (auxiliary aids and services) to convert aurally delivered material into visual form for the hearing impaired, or visually delivered material into audible form for the visually impaired.

The trial court reached a contrary conclusion by essentially ignoring the language of the statute, and relying instead on *dicta* from cases dealing with altogether different fact patterns, on one statement (or a snippet) in the legislative history, and on an inconsistent and unexplained interpretation of administrative regulations. None can prevail over unambiguous statutory language. As this Court has said

The starting point for [the] interpretation of a statute is always its language, and courts must presume that that a legislature says in a statute what it means and means in a statute what it says there.

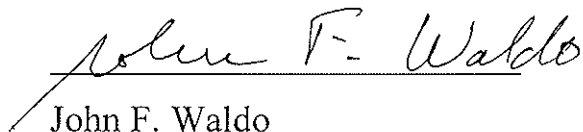
Azarte v. Ashcroft, 394 F.3d 1278, 1285 (9th Cir. 2005), citations omitted.

The trial court declared that ADA does not impose affirmative demands on movie theaters to make their services accessible to the disabled, but only requires that the facility not obstruct the efforts of the hearing or visually impaired to attend their films. Assuming there is a general rule to the effect that ADA only requires access, the specific and affirmative requirement to provide “auxiliary aids and services” is an exception. The trial court also deemed the conversion of aural material into visual form and vice versa to be a fundamental alteration of defendant theaters’ “service,” which it said ADA does not require, a rule gleaned from cases dealing with insurance policies. Again, if there is a general rule to the effect that

goods and services need not be altered, the statutory definition of “auxiliary aids and services” as devices or methods to convert aural material into visual form and vice versa is a specific exception.

For the foregoing reasons, the trial court’s decision should be reversed, and this matter should be remanded for a full trial on the merits.

RESPECTFULLY SUBMITTED this 10th day of December, 2008.



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STATEMENT OF RELATED CASES

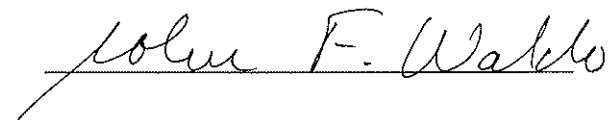
Pursuant to Ninth Circuit Rule 28.2.6, *Amicus Curiae* Washington State Communications Access Project and the other organizations joining this brief state that they are unaware of any related cases pending before the Ninth Circuit.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2003 in Times New Roman 14 pt. type.


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Date: 12/08/08

CERTIFICATE OF SERVICE

I certify that on this 10th day of December, 2008, I mailed first class, postage prepaid, the original and 15 copies of the brief of *Amicus Curiae* Washington State Communication Access Project, joined by the Hearing Loss Association of America, the Hearing Loss Association of Washington, the Arizona Commission for the Deaf and Hard of Hearing, HLA chapters in Phoenix, West Valley, Fountain Hills, Prescott and Yuma, Arizona, the Adult Loss of Hearing Association in Tucson, Arizona and the Association of Late Deafened Adults, Puget Sound Chapter, which brief is filed in support of appellants seeking reversal of the trial court's decision, to:

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